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# MUTUALLY EXCLUSIVE NONCOMMERCIAL EDUCATIONAL FM APPLICATIONS: ACCEPTED FOR FILING, TENTATIVELY SELECTED, AND . . . GRANTED?

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## I. INTRODUCTION

Did you hear that static as you changed channels on your FM radio? In many cities, that is where you should be able to listen to a new noncommercial educational FM radio station. Nearly ten years ago, two or more noncommercial applicants filed competing license applications with the Federal Communications Commission (“FCC” or “Commission”) to build a new station on that channel.<sup>1</sup> In a process known as comparative hearings,<sup>2</sup> the FCC determined which of the applicants could broadcast on that channel. The comparative hearing decision-making process proved to be a difficult task for the FCC and was

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<sup>1</sup> See 47 U.S.C. § 307(b) (2000) (directing the FCC to make “such distributions of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service” across the United States); 47 C.F.R. § 73.7002(a) (2004) (determining the fair distribution of service goals on reserved band FM channels). Applications must base this “fair distribution” analysis on “snap shot” Census data and dates. Supplements and Settlements to Pending Closed Groups of Noncommercial Educational Broadcast Applications Due by June 4, 2001; Settlement Caps Waived Until June 4, 2001; Settlement Caps Waived Until June 4, 2001, *Public Notice*, 16 F.C.C.R. 6893 (Mar. 22, 2001).

<sup>2</sup> See Policy Statement on Comparative Broadcast Hearings, *Public Notice*, 1 F.C.C.2d 393 (July 28, 1965) [hereinafter Policy Statement] (resolving whether an applicant meets the threshold qualifications for a broadcast license and determining which of the qualified applicants would provide the best practicable service to the public interest).

successfully challenged in court.

Prior to the early 1990s, integration through comparative hearings and auctions was used to award licenses to both noncommercial and commercial mutually exclusive ("MX'd") broadcast applicants.<sup>3</sup> Before the U.S. Court of Appeals for the District of Columbia Circuit rendered *Bechtel v. FCC*,<sup>4</sup> integration was the FCC's primary comparative hearing criterion for evaluating MX'd applications.<sup>5</sup> Shortly thereafter, the FCC opened a proceeding to select a replacement methodology for comparative hearings and eventually adopted a point system.<sup>6</sup> After surviving challenges at the FCC and in the courtroom, the District of Columbia Circuit upheld the point system in May 2004.<sup>7</sup> Over a year later, in June 2005, the FCC has finally released its first letter tentatively selecting a MX'd noncommercial educational ("NCE") FM application based on its § 307(b) analysis—an evaluation system used prior to the application of the NCE Point System to an MX'd application group.<sup>8</sup> This appeared to be great news; however, the FCC seems to have halted processing additional applications. To make matters worse, the Commission has not subsequently released any letters tentatively selecting a MX'd NCE FM application after applying the point system. Why is this so? A point system, unlike a § 307(b) determination, must be decided by the full Commission or an administrative law

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<sup>3</sup> See 47 U.S.C. § 309(j)(2)(C); *Id.* § 397(6) ("Noncommercial educational broadcast station . . . [and] public broadcast station [are defined as a television or radio broadcast station that] (A). . . is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or (B) is owned and operated by a municipality and which transmits only noncommercial programs for education purposes.").

<sup>4</sup> See *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993).

<sup>5</sup> All pending cases were frozen when the District of Columbia Circuit invalidated the criteria for deciding the licensing cases in *Bechtel*. See Press Release, Federal Communications Commission, FCC Adopts Auction Procedures for Commercial Broadcast Licenses (Aug. 7, 1998), [http://www.fcc.gov/Bureaus/Mass\\_Media/News\\_Releases/1998/nrmm8025.html](http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/1998/nrmm8025.html).

<sup>6</sup> See *In re* Reexamination of the Comparative Standards for Noncommercial Educational Applicants, *Further Notice of Proposed Rulemaking*, 13 F.C.C.R. 21,167 (Oct. 21, 1998); 47 C.F.R. § 73.7003(a) (implementing a system that presumptively awards the license to the applicant with the greatest number of "points," which are dependent on a variety of criteria).

<sup>7</sup> *Am. Family Ass'n, Inc. v. FCC*, 365 F.3d 1156 (D.C. Cir. 2004) (holding that the system's award of local credit points was not arbitrary or capricious).

<sup>8</sup> Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, Federal Communications Commission, to Reformed Broadcasting Network, Inc., et al. (July 7, 2005), 20 F.C.C.R. 11,998. A threshold determination of whether § 307(b) goals will be furthered by an application includes whether the first or second reserved channel serves the larger population with greater community radio service needs. See *In re* Applications of Romar Communications, Inc., for a Construction Permit for a New AM Station at Lansing, New York and KM Communications, Inc., for a Construction Permit for a New AM Station at South Hill, New York, *Memorandum and Opinion Order*, 19 F.C.C.R. 23,128 (Nov. 23, 2004).

judge and cannot be delegated to the FCC's Media Bureau.

The NCE Point System developed by the FCC has the potential to perform a great service for the public interest and is a marked improvement from the previous regime of comparative hearings. For the system to be implemented effectively, the Commission must take a few vital steps. The Commission should: (1) seek delegated authority from Congress to enable FCC staff attorneys to assign point determinations for NCE applicants; (2) breathe life into its point system definitions by clarifying what qualifies as minimal compliance under each category; and (3) establish a series of checks and balances within the NCE Point System to protect the public interest once tentative selections have been made.

This article reviews the FCC's development of a new procedure for evaluating MX'd NCE applications and identifies some of the difficulties facing the FCC as it implements its point system. In determining the best approaches to evaluate MX'd applications, various characteristics of the FCC's comparative hearings are examined, including an explanation of why the hearings were abandoned. The pros and cons of a simplified traditional hearing, weighted lottery, and point system will also be evaluated. Lastly, this article suggests regulatory and legislative actions that will facilitate the implementation of the FCC's point system for MX'd NCE FM applications, including the three steps suggested above.

## II. WHAT ARE THE BEST APPROACHES FOR EVALUATING MUTUALLY EXCLUSIVE APPLICATIONS?

For nearly thirty years, the FCC used comparative hearings to evaluate MX'd commercial and noncommercial applications.<sup>9</sup> After *Bechtel* invalidated integration, the FCC's primary comparative hearing criteria at the time, the FCC was forced to find a new methodology to evaluate MX'd applications for commercial and noncommercial stations.<sup>10</sup> The FCC considered the use of a simplified traditional hearing, a weighted lottery, and a point system to replace comparative hearings.<sup>11</sup> One of the FCC's goals was to adopt a methodology

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<sup>9</sup> See *In re* Reexamination of the Comparative Standards for Noncommercial Education Applications, *Report and Order*, 15 F.C.C.R. 7386, ¶ 5 (Apr. 21, 2000) [hereinafter NCE R&O]. Interest in changing this subjective comparative hearing process dates back to the early 1990s. *Id.*

<sup>10</sup> *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993). Integration refers to the FCC's preference in comparative hearings for the combination of ownership and station management, and presumes that stations will offer better service if owners are involved in the station's daily management. *Bechtel* determined this was "arbitrary and capricious," requiring a broader FCC inquiry into other selective methods. See NCE R&O, *supra* note 9, ¶¶ 4–6.

<sup>11</sup> See NCE R&O, *supra* note 9, ¶ 6; see also Lewis J. Paper & Herbert E. Marks, *The Future of Telecommunications*, in TELECOMMUNICATIONS POLICY AND REGULATION 159,

based on an objective standard in order to eliminate some of the problems associated with comparative hearings.<sup>12</sup>

#### A. Comparative Hearings

In the FCC's Policy Statement on Comparative Broadcast Hearings ("Policy Statement"), the Commission first compiled its standards for comparative hearings that had developed informally since the 1930s.<sup>13</sup> In the Policy Statement, the FCC stated that its "two primary objectives" for comparative hearings were to select an application that would deliver "the best practicable service to the public and, second, a maximum diffusion of control of the media of mass communications."<sup>14</sup> The FCC then identified the following significant factors for implementing each objective: "1. [d]iversification of control of the media of mass communications . . . 2. [f]ull-time participation in station operation by owners . . . 3. [p]roposed program service . . . 4. [p]ast broadcast record . . . 5. [e]fficient use of frequency . . . 6. [c]haracter . . . [and] 7. [o]ther factors."<sup>15</sup>

In the early 1990s, support for comparative hearings began to wane. Not only were comparative hearings expensive and time consuming for applicants,<sup>16</sup> but the FCC's own Review Board described the criteria used to select MX'd NCE as "vague," "meaningless," and difficult to use in order to select a rational applicant.<sup>17</sup> Shortly thereafter, the U.S. Court of Appeals for the Dis-

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196-201 (PLI Patents, Copyrights, Trademarks & Literary Property Course Handbook Series No. G4-3894, 1992).

<sup>12</sup> See NCE R&O, *supra* note 9, ¶ 1 (comparing objective characteristics when there are competing applications ensures the new system is faster and less expensive, and continues "to foster the growth of the public broadcasting" as expressions of "diversity and excellence").

<sup>13</sup> See Policy Statement, *supra* note 2.

<sup>14</sup> *Id.* at 394. These two objectives and the FCC's significant implementing factors are reflected in the FCC's new NCE Point System criteria. *Cf.* NCE R&O, *supra* note 9, ¶¶ 29-61 (stating that in the NCE Point System, points are awarded based on the following criteria after the FCC has determined the relative need of a community for a new NCE FM station: (1) diversity of ownership; (2) technical parameters; (3) localism; and (4) state-wide network).

<sup>15</sup> Policy Statement, *supra* note 2, at 394-400. The character factor was later deleted because it was costly for applicants to prove and usually led to finger pointing and name-calling, which was not very helpful comparative information for the FCC. See *In re Policy Regarding Character Qualifications in Broadcast Licensing; Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations To the Commission by Permittees and Licensees, Report, Order and Policy Statement*, 102 F.C.C.2d 1179 (Jan. 14, 1986).

<sup>16</sup> See NCE R&O, *supra* note 9, ¶ 1.

<sup>17</sup> *In re Applications of Real Life Educational Foundation of Baton Rouge, Inc., Jimmy Swaggart Ministries, For Construction Permit for a New Noncommercial Educational Broadcast Station, Channel 203C2, in Baton Rouge, Louisiana, Decision*, 6 F.C.C.R. 2577, 3580 n.8 (May 14, 1991).

trict of Columbia Circuit determined that the FCC's integration criteria for comparative hearings was arbitrary and capricious and, therefore, unlawful.<sup>18</sup> As noted above, the FCC responded by initiating a proceeding to review its comparative hearing criteria for commercial and noncommercial applications<sup>19</sup> and froze nearly all pending comparative hearings.<sup>20</sup>

While the FCC struggled to replace comparative hearings, Congress enacted the Balanced Budget Act of 1997, which required the FCC to use auctions in place of comparative hearings for selecting MX'd applicants for non-reserved broadcast channels.<sup>21</sup> The Balanced Budget Act of 1997 did not require manda-

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<sup>18</sup> *Bechtel v. FCC*, 10 F.3d 875, 877 (D.C. Cir. 1993). In an early FCC decision, the importance of integration was described as a weighting factor: "Other significant factors being equal, . . . the Commission is inclined to prefer an applicant who intends to manage and operate the proposed station personally rather than to entrust its operation to employees." *Id.* (citing *In re Application of Homer Rodeheaver, Fort Wayne, Ind.; Community Broadcasting Corp., Fort Wayne, Ind.; Radio Fort Wayne, Inc., Fort Wayne, Ind. For Construction Permits*, 12 F.C.C. 301, 307 (Oct. 21, 1947)).

<sup>19</sup> See *In re Reexamination of the Policy Statement on Comparative Broadcast Hearings, Notice of Proposed Rulemaking*, 7 F.C.C.R. 2664 (Apr. 10, 1992); *In re Reexamination of the Policy Statement on Comparative Broadcast Hearings, Further Notice of Proposed Rulemaking*, 8 F.C.C.R. 5475 (Aug. 12, 1993); *In re Reexamination of the Policy Statement on Comparative Broadcast Hearings, Second Further Notice of Proposed Rulemaking*, 9 F.C.C.R. 2821 (June 22, 1994); see also *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcasting and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, Notice of Proposed Rulemaking*, 12 F.C.C.R. 22,363 (Nov. 25, 1997) [hereinafter *Competitive Bidding*]; *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcasting and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, First Report and Order*, 13 F.C.C.R. 15,920 (Aug. 18, 1998); *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcasting and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, Memorandum Opinion and Order*, 14 F.C.C.R. 8724 (Apr. 20, 1999); *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcasting and Instructional Television Fixed Service Licenses, Memorandum Opinion and Order*, 14 F.C.C.R. 12,541 (Aug. 5, 1999).

<sup>20</sup> See FCC Freezes Comparative Hearings, *Public Notice*, 9 F.C.C.R. 1055 (Feb. 25, 1994); Modification of Comparative Proceedings Freeze Policy, *Public Notice*, 9 F.C.C.R. 6689 (Aug. 4, 1994) ("Where program tests have already commenced, operations may be continued so as not to deprive the public of existing service."); *In re Reexamination of the Comparative Standards for New Noncommercial Educational Applicants, Notice of Proposed Rulemaking*, 10 F.C.C.R. 2877 (Mar. 17, 1995); FCC Waives Limitations on Payments to Dismissing Applicants in Universal Settlements of Cases Subject to Comparative Proceedings, *Public Notice*, 10 F.C.C.R. 12,182 (Sept. 15, 1995).

<sup>21</sup> See Balanced Budget Act of 1997, Pub. L. No. 105-33, 11 Stat. 251 (codified at 47 U.S.C. § 309(j)). Non-reserved channels constitute all of the broadcast channels available for commercial FM stations. However, reserved channels are only available to NCE FM

tory auctions for reserved broadcast channel NCE stations. As a result, the FCC was left with a challenging decision regarding what methodology to use in awarding reserved channel licenses with no specified alternatives proposed by Congress.<sup>22</sup> The FCC announced in the Noncommercial Education Applications Report and Order ("NCE R&O") that it was adopting a point system in lieu of alternatives such as traditional hearings<sup>23</sup> and weighted lotteries.<sup>24</sup>

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stations (channels 201 (88.1 mHz) through 220 (91.9 mHz)). *Id.*

<sup>22</sup> *Id.* § 3002.

<sup>23</sup> In the NCE Report and Order, the FCC determined that the primary benefits of a traditional hearing, such as the ability to carefully scrutinize each applicant and the ability to identify abuse by questioning applicants before a judge, did not outweigh the financial costs of a hearing. NCE R&O, *supra* note 9, ¶ 10. Hearings are expensive for noncommercial applicants, consume a large amount of FCC resources, and delay the launching of new non-commercial service to the public. *Id.* Frequently, comparative hearings conclude with a settlement between the parties rather than a decision by an administrative law judge. *Id.* The FCC wisely declined to retain hearings for MX'd applications on the basis that the same benefits could be achieved by using a system of comparisons, "coupled with safeguards to address any potential for abuse." *Id.* Furthermore, the adoption of a simplified hearing would have contradicted the Commission's overarching goal of streamlining its regulations. *See, e.g., In re* 1998 Biennial Regulatory Review—Streamlining of Mass Media Applications, Rules and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, *Report and Order*, 13 F.C.C.R. 23,056 (Nov. 25, 1998); *In re* Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcasting and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, *First Report and Order*, 13 F.C.C.R. 15,920 (Aug. 18, 1998); *In re* 1998 Biennial Regulatory Review—Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, *First Report and Order*, 14 F.C.C.R. 5272 (Mar. 30, 1999).

<sup>24</sup> Weighted lotteries and first to file methodologies were the most strongly opposed of any of the alternatives suggested by the FCC to replace noncommercial comparative hearings. *In re* Reexamination of the Comparative Standards for Noncommercial Educational Applicants, *Memorandum Opinion and Order*, 16 F.C.C.R. 5074, ¶ 13 (Feb. 28, 2001) [hereinafter 2001 NCE *Memorandum Opinion and Order*]. The FCC identified commenters' three major concerns regarding lotteries: "(1) speculation; (2) failure to select the best applicant; and (3) the potential for judicial challenge and delay." *Id.* Commenters suggested that speculation had already started, considering there were fifteen to twenty applicants that had filed the vast majority of MX'd exclusive commercial and noncommercial applications pending before the FCC. NCE R&O, *supra* note 9, at 7392 n.7 ("[O]ver 400 of our current applications involve 15 to 20 NCE applicants who have overfiled against each other in virtually every state."). One important drawback for of a lottery system is that it replaces the selection of the best-qualified applicant with one selected at random. *Id.* ¶ 13. The random selection of an applicant means that in some cases, the best-qualified applicant will not be selected and the selection will not serve the public interest, convenience, and necessity. *See* 47 U.S.C. § 309(a) (2000). As a result, implementing a weighted lottery system for NCEs was not in the best interest of the FCC.

## B. Point System

Unlike the public response to lotteries, the Commission received broad support for the use of a point system to select between MX'd noncommercial applicants. A point system was successfully used in the Instructional Television Fixed Service, another service with educational goals.<sup>25</sup> As a result of this success, the FCC used this point system as a framework for the noncommercial point system.<sup>26</sup> In comparison to comparative hearings, commenters favored a point system because it would be an "objective, inexpensive, and streamlined process" and it would select the applicant with the best-proposed use of the spectrum.<sup>27</sup>

The FCC agreed with commenters, stating that a carefully designed point system would further the Commission's goals for noncommercial spectrum.<sup>28</sup> A point system would eliminate the uncertainty and subjectiveness of comparative hearings and decrease the cost and time associated with evaluating MX'd applications for both the FCC and applicants.<sup>29</sup> A point system effectively allowed the Commission to select an applicant rather than leaving that decision to chance as in a lottery system. The Commission also proposed to replace lengthy narrative descriptions of an applicant's proposed operations and qualifications with short descriptions and a point tally.<sup>30</sup>

## III. NCE POINT SYSTEM CRITERIA ADOPTED BY THE FCC

Once the FCC selected a point system to evaluate MX'd NCE applications,

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<sup>25</sup> See *In re* Amendment of Part 74 of the Commission's Rules and Regulations in Regarding to the Instructional Television Fixed Service, *Second Report and Order*, 101 F.C.C.2d 50, ¶ 39 (June 20, 1985) [hereinafter *Instructional Television Fixed Service*] ("[A] point system, or a combination method, such as a point system with a tie-breaking mechanism.").

<sup>26</sup> See *In re* Amendment of Part 74 of the Commission's Rules and Regulations in Regarding to the Instructional Television Fixed Service, *Memorandum Opinion and Order*, 59 Rad. Reg. 2d (P & F) 1355 (Jan. 30, 1986); NCE R&O, *supra* note 9, ¶¶ 16–18.

<sup>27</sup> NCE R&O, *supra* note 9, ¶ 16.

<sup>28</sup> See *id.* ¶ 1 ("We believe that the new system will be faster and less expensive than the former system but will continue to foster the growth of public broadcasting as 'an expression of diversity and excellence, and . . . a source of alternative telecommunications services for all citizens of the Nation.'" (citing 47 U.S.C. § 396(a)(5) (2000)).

<sup>29</sup> See NCE R&O, *supra* note 9, ¶ 18. Applicants would not face the large travel and legal expenses required to prepare a case for hearing. Timesaving mechanisms would also assist the FCC's decision-making process with the public's overall interest in mind. *Id.*

<sup>30</sup> See *id.* From experience, we now know the point system is not as fast as the Commission expected it to be and settlement negotiations, rather than point determinations, are resolving many MX'd applications. At the time of this article's publication, the Commission has yet to grant an application based on a point determination. See, e.g., Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, Federal Communications Commission, to Houston Christian Broadcasters, Inc., et al. (July 29, 2005), 2005 FCC LEXIS 4354.

it needed to determine the point comparison and criteria of competing applications for new stations and those undergoing major modifications. The FCC selected the following criteria for evaluating MX'd NCE FM applications: diversity of ownership, technical parameters, localism, and statewide networks.<sup>31</sup>

#### A. Diversity of Ownership (2 Points)

Diversity of local ownership has always been an important issue for the FCC since it exposes the public to "a variety of viewpoints from different sources."<sup>32</sup> In order to encourage diversity, the FCC will "award two points to the applicant if the principal community (city grade) contour of the proposed station does not overlap the principal community (city grade) contour of any attributable NCE or commercial station."<sup>33</sup> Radio applicants are also compared to radio ownership, and television applicants to television ownership.<sup>34</sup> For AM stations, the principal community (city grade) contour is the 5 mV/m contour, and the principal community (city grade) contour for FM stations is the 3.16 mV/m contour.<sup>35</sup> This overlap could determine whether an FM station receives the two point diversity of ownership allotment.

All directors, officers, and voting shareholders of an applicant and its parent or subsidiary organizations have an "attributable" interest in the applicant.<sup>36</sup> Any entity that provides more than 33% of an applicant's equity, debt, or both, and either supplies more than 15% of the station's weekly programming or has an attributable interest in other media in the same market, also has an "attributable" interest.<sup>37</sup> Therefore, any noncommercial or commercial radio station interests held by the applicant's attributable interest holders are also attributable to the applicant. If there is contour overlap between any attributable sta-

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<sup>31</sup> See NCE R&O, *supra* note 9, ¶¶ 3, 28–61.

<sup>32</sup> *Id.* ¶ 33. Critical considerations in favor of this diversity illustrate the contrast between local ownership and national radio ownership. The FCC has restricted local ownership to no more than eight stations in the largest markets of forty-five or more stations, whereas with national radio ownership, there are no such limits. See also *In re Implementations of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership and Dual Network Operations)*, Order, 11 F.C.C.R. 12,374 (Mar. 8, 1996) (noting the FCC's lack of persuasion that national ownership should play such a pivotal role in licensing stations).

<sup>33</sup> *Id.* ¶ 35 (supporting the FCC's belief that principal community (city grade) contours are the "most appropriate benchmark for examining local diversity").

<sup>34</sup> *Id.* ¶¶ 35–36.

<sup>35</sup> 47 C.F.R. § 73.24(i) (2004) (requiring that for AM stations, "the daytime 5 mV/m contour encompasses the entire principal community to be served"); *id.* § 73.315(a) (requiring that for FM stations, transmitters will be located such that the "3.16 mV/m [contour] will be provided over the entire principal community to be served").

<sup>36</sup> NCE R&O, *supra* note 9, ¶¶ 75–79 (noting the similarity to commercial attribution standards); see also 47 C.F.R. § 73.3555.

<sup>37</sup> 47 C.F.R. § 73.7000 (defining attributable interests).



tions and the applicant's proposed station, the applicant cannot claim two points for diversity of ownership.<sup>38</sup>

#### B. Technical Parameters (1 Point–2 Points)

The FCC believes the public interest in full-power NCE stations is best served when applicants design and operate their facilities in order to reach both the widest possible area and largest population.<sup>39</sup> Accordingly, the FCC decided to award one point to applicants that provide coverage to "at least 10% greater area and a 10% greater population" than other MX'd applicants.<sup>40</sup> For applications that propose to provide coverage to "a 25% greater area and population," the entity will be awarded two points.<sup>41</sup>

#### C. Localism: Established Local Applicant (3 Points)

Before adopting localism as a factor, the Commission had to resolve the concerns raised in *Bechtel*. The *Bechtel* court invalidated the criterion previously used by the FCC to select MX'd commercial broadcast applications.<sup>42</sup> The court reasoned that the successful applicant was not obligated to implement its integration proposal, and commented that evidence was lacking indicating the percentage of successful applicants voluntarily adhering to the characteristics outlined in their application.<sup>43</sup> The court also stated that the FCC's argument claiming integration furthered the public interest was more of a "predictive judgment" and not supported by adequate evidence.<sup>44</sup> Lastly, the court expressed concern that the FCC had emphasized qualitative integration over other quantitative factors such as spectrum efficiency, broadcast experience,

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<sup>38</sup> See, e.g., FCC, INSTRUCTIONS FOR POINT SUPPLEMENT TO PENDING FCC 329 (2001), <http://www.fcc.gov/Forms/Form349supp/349supp.pdf> (noting the required point system factors for diversity of ownership).

<sup>39</sup> NCE R&O, *supra* note 9, ¶ 39.

<sup>40</sup> *Id.* (noting that the greater population and area the station covers, the greater benefit from the programming and a simpler proposal for both the FCC and applicant to determine).

<sup>41</sup> *Id.* To ensure that MX'd applications may be compared, the FCC stated that applicants must use the same standards to determine coverage area and population. Applicants are also instructed by the FCC to use the most recent census block data to determine population. Area should be measured by the number of square kilometers within the 60 dBu service contour of FM stations. Station contours must be calculated using the standard predicted contours established in § 73.313 of the Commission's rules. *Id.* ¶¶ 39–40; 47 C.F.R. § 73.313.

<sup>42</sup> *Bechtel v. FCC*, 10 F.3d 875, 879 (D.C. Cir. 1993).

<sup>43</sup> *Id.* (stating the FCC has done little to ensure that applicants maintain the characteristics of their proposed operations for which the application was selected, and there appeared to be no consequence for abandoning an application's original proposal as long as the applicant's intent was not misrepresented in the original application).

<sup>44</sup> *Id.*

and local residence—factors that would directly impact a station's performance and create a "clear" advantage.<sup>45</sup>

The Commission has long valued localism. The promotion of localism has been the basis for NCE broadcasting since the inception of the service.<sup>46</sup> Additionally, the Communications Act stresses the importance of localism in plain language.<sup>47</sup> The *Bechtel* court recognized that an applicant who is a local community resident is more keenly aware of the special needs of its community.<sup>48</sup> As acknowledged by recurring FCC action, these issues are cyclical and resurface regularly.<sup>49</sup>

With these considerations in mind, the FCC decided to award applications three points for local ties to the community.<sup>50</sup> The Commission defined a local applicant as one who for the two years immediately preceding the filing of the

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<sup>45</sup> *Id.* at 882. Quantitative integration measures the ownership percentages of those owners proposing to have a managerial position at the station and varies depending on whether the owners would work full-time or part-time. Quantitative credit, in turn, affects the weight given to various qualitative "enhancement" factors, including local residence of integrated owners. See NCE R&O, *supra* note 9, ¶ 42.

<sup>46</sup> See NCE R&O, *supra* note 9, ¶¶ 43–44. The 1967 report of the Carnegie Commission on Educational Television illustrates that the roots of noncommercial educational broadcasting within the local community:

Educational television is to be constructed on the firm foundation of strong and energetic local stations. The heart of the system is to be in the community . . . [T]he overwhelming proportion of programs will be produced in the stations . . . local skills and crafts will be utilized and tapped. . . . Like a good metropolitan newspaper, the local station will reflect the entire nation and the world, while maintaining a firm grasp on the nature and needs of the people it serves.

*In re* Reexamination of the Comparative Standards for Noncommercial Educational Applicants, *Reply Comments of Center for Media Education et al.*, Docket No. 95-31 (Mar. 15, 1999) (accessible via FCC Electronic Comment Filing System).

<sup>47</sup> 47 U.S.C. § 396 (2000). The section of the Communications Act that establishes the Corporation for Public Broadcasting states: "Public television and radio stations constitute valuable local community resources for utilizing electronic media to address national concerns and solve local problems through community programs and outreach programs."

<sup>48</sup> See *Bechtel*, 10 F.3d at 885 (stating local community familiarity is more important for determining community needs than station visitors or correspondence); see also *Orion Commc'ns, Ltd. v. FCC*, 131 F.3d 176, 179–80 (D.C. Cir. 1997) (noting *Bechtel's* affect on furthering the public interest through aware and responsive owners who are familiar with their communities' special needs).

<sup>49</sup> See *In re* Broadcast Localism, *Notice of Inquiry*, 19 F.C.C.R. 12,425 (July 1, 2004). At the time, comments and reply comments were filed, hearings were held, and studies were completed so the Commission could hear from the public. As Commissioner Michael J. Copps recognized, people believed localism was important but were receiving very little locally tailored programming from the big broadcast companies. *Id.* at 12,447–48 (Michael J. Copps, Commissioner, Federal Communications Commission, Remarks Before Hearing on Localism and License Renewal, San Antonio, Texas (Jan. 28, 2004)).

<sup>50</sup> See NCE R&O, *supra* note 9, ¶ 53; see also *Am. Family Ass'n, Inc. v. FCC*, 365 F.3d 1156 (D.C. Cir. 2004) ("The FCC explained that there is a strong tradition of local control in NCE broadcasting, and that local entities best understand the education needs of, and are accountable to, their communities.").

application was either (1) physically headquartered in the community of license; (2) operated a campus within the community; or (3) 75% of the Board members resided within twenty-five miles of the proposed community of license.<sup>51</sup> The points are available to both secular and non-secular applicants, and do not distinguish based on an organization's size.<sup>52</sup> As adopted, the localism credit attempts to include as many applicants as possible, contrary to the localism requirements originally proposed by the FCC.

Additionally, to encourage localism and ensure that a station will operate as proposed, the Commission established "a four-year holding period for on-air operations during which licensees will be required to maintain the characteristics for which they receive credit . . ." in the noncommercial point system.<sup>53</sup> The holding period will ensure that local communities receive the benefits proposed by applicants and give meaning to an applicant's promise to provide specific services to a local community.<sup>54</sup> If applicants are not held responsible for constructing and providing the services proposed in their applications, the point system will be rendered meaningless. An applicant cannot be rewarded for services that it does not provide.

#### D. Statewide Network Credit (2 Points)

Applicants unable to claim credit for diversity of ownership might nevertheless earn two points as a "statewide network" if they meet one of three criteria. The first is a public or private entity with authority over a specified number of secondary schools that are regularly providing programming in furtherance of the school's curriculum. The proposed station must regularly increase the number of schools served.<sup>55</sup> The number of schools selected by the FCC is based on statistical information provided by commenters and the FCC's desire

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<sup>51</sup> NCE R&O, *supra* note 9, ¶ 54. Government entities are considered local throughout the area within which their authority extends. *Id.*

<sup>52</sup> *Id.* ¶ 52.

<sup>53</sup> *Id.* ¶ 48. One goal of the holding period is to ensure that applications are held accountable for the services proposed in their applications. In *Bechtel*, the court concluded the FCC's integration criterion was unlawful because it failed to hold applicants accountable for the characteristics of service proposed in their winning application. In addition to adopting a four-year holding period, the FCC will conduct applicant audits to ensure compliance. *Bechtel*, 10 F.3d at 880.

<sup>54</sup> See NCE R&O, *supra* note 9, ¶¶ 47–49.

<sup>55</sup> *Id.* ¶ 58 ("[A]n entity, public or private, with authority over a minimum of 50 accredited full-time elementary and/or secondary schools within a single state and encompassed by the combined primary service contours of the proposed station and its existing station(s), if the existing station(s) are regularly providing programming to the schools in furtherance of their curriculum and the proposed station will increase the number of schools it will regularly serve.").

to select one number for both radio and television applicants.<sup>56</sup>

The second criteria encompasses “accredited public or private institution[s] of higher learning” with a minimum of five statewide campuses that are regularly provided programming by the proposed station, and a similar requirement of increasing the number of schools served.<sup>57</sup> The FCC studied the number of students attending five full-time campuses of accredited universities and determined that the five campuses generally incorporated roughly the same number of students as fifty elementary and secondary full-time public schools.<sup>58</sup> Based on this conclusion, the FCC is reasonable in offering two points for being a statewide network to state universities that provide service to at least five campuses.

The final criteria covers entities that might not have any direct authority over schools, but regularly provide programming for school curriculum.<sup>59</sup> This definition is broader than the FCC’s previously existing definition of a statewide network. Ultimately, the FCC deleted the definition of a statewide network in § 73.502 and replaced it with the definition set forth in the NCE R&O to incorporate the language into the new noncommercial point system rules.<sup>60</sup>

Points for statewide networks originated from the FCC’s concern that established statewide networks will not qualify for the diversity of ownership points due to station contour overlap.<sup>61</sup> The FCC recognized that statewide networks contributed to noncommercial broadcasting by ensuring that educational programming is available throughout a geographic area in the most practicable manner for that region. Such stations centralize operations in order to extend service to outlying areas within their jurisdiction. Nevertheless, without a statewide credit, many such applicants would be at a disadvantage in a point system because its licensed stations may have overlapping contours.<sup>62</sup> This overlap would prevent a statewide system from claiming the diversity of ownership credit and make it difficult for the applicant to compete with other local applicants.<sup>63</sup>

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* (“[A]n accredited public or private institution of higher learning with a minimum of five full time campuses within a single state encompassed by the combined primary service contours of the proposed station and its existing station(s), if the existing station(s) are regularly providing programming to campuses in furtherance of their curriculum and the proposed station will increase the number of campuses it will regularly serve.”).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* (“[A]n entity, public or private, with or without direct authority over schools, that will regularly provide programming for and in coordination with an entity or institution described in (a) or (b) above for use in its school curriculum.”).

<sup>60</sup> *Id.* ¶ 61; 47 C.F.R. § 73.7003(b)(3)(i)–(iv) (2004).

<sup>61</sup> See 2001 NCE Memorandum Opinion and Order, *supra* note 24, ¶¶ 59–60.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

The adoption of a two-point credit available to both public and private entities remedies such a problem. To further encourage statewide applicants, the entity does not need to be a government institution or a school itself to qualify for the credit.<sup>64</sup> Applicants working in cooperation with public or private school systems in providing programming material to the schools may claim the credit.<sup>65</sup> As long as the state government has jurisdiction over schools and the private entity is participating in the government's statewide educational program, the applicant is presenting programming that could be used in schools for educational purposes.<sup>66</sup> Nonprofit organizations that are not educational institutions may also claim the statewide network points so long as they are providing programming to accredited schools in concert with the school's education plan.<sup>67</sup> No applicant may claim both the diversity of ownership and statewide network points.<sup>68</sup>

#### E. Other Criteria Considered, But Not Included in the Noncommercial Point System

The FCC considered the following criteria for inclusion in the NCE point system, but in the end determined them to be unnecessary or not in the public interest.

##### 1. *Minority Preference*

The FCC decided to defer consideration of a credit for minorities until it had a chance to conduct a fact-finding study to determine whether such a preference would withstand strict scrutiny.<sup>69</sup> This discussion was in response to the Supreme Court decision in *Adarand Constructors, Inc. v. Peña*, which subjected all government-imposed racial minority preferences to strict scrutiny review.<sup>70</sup>

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<sup>64</sup> See NCE R&O, *supra* note 9, ¶ 59.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* ¶ 59–60.

<sup>67</sup> See 47 C.F.R. §§ 73.503(a), 73.621(a) (2004) (detailing the licensing requirements and services for NCE stations); NCE R&O, *supra* note 9, ¶ 59.

<sup>68</sup> See NCE R&O, *supra* note 9, ¶ 60. The statewide network credit is not available to large national or regional NCE station networks because such networks do not have a relationship with and do not provide programming uniquely tailored to the local accredited schools in each station's community. The inability of large and regional NCE networks to claim two points for being a statewide network is not detrimental to such applicants because they will be able to claim two points for diversity of ownership since their stations do not usually suffer from contour overlap. *Id.*

<sup>69</sup> See *id.* ¶ 62.

<sup>70</sup> See *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995) (“[S]uch classifications are constitutional only if they are narrowly tailored measures that further compel[ing] gov-

## 2. Existing Broadcasters

The FCC rejected adopting a credit for existing broadcasters because it concluded that experience does not outweigh new entrant creativity and diversity.<sup>71</sup> The Commission noted that in auctions for commercial channels, it provides a bidding credit to new entrants and reasoned that giving a credit for experience in the NCE Point System would be contrary to that policy.<sup>72</sup> Furthermore, allowing existing broadcasters to apply for additional NCE FM stations would not encourage diversity of ownership.<sup>73</sup>

## 3. Locally Originated Programming

The FCC traditionally does not involve itself in programming decisions. For this reason, it declined to adopt a credit for locally originated programming.<sup>74</sup> Programming decisions are at the discretion of the broadcaster. Based on the record in the NCE rulemaking, the FCC wisely decided not to disturb that policy.<sup>75</sup>

## 4. Funding Sources

Commenters suggested awarding one point for funding sources to applicants that are eligible for the government-administered Public Telecommunications Funding Program ("PTFP"). The FCC declined, stating "[P]ublic interest factors that we believe are important to the selection of NCE licensees [are] incorporated in our point system."<sup>76</sup> The FCC held there was an insufficient basis to adopt funding criteria. It pointed towards comments which stated that a point based on the PTFP would exclude applicants not otherwise qualified for

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ernmental interests."). The National Federation of Community Broadcasters ("NFCB") suggested the FCC conduct a fact-finding investigation regarding minority preference after *Adarand*. The FCC adopted this suggestion and stated that it would reserve judgment on the inclusion of a minority preference for the NCE point system until results were received from such an inquiry. See NCE R&O, *supra* note 9, ¶ 62.

<sup>71</sup> See NCE R&O, *supra* note 9, ¶ 64.

<sup>72</sup> See *id.* ¶ 64.

<sup>73</sup> See *id.* ("[W]e cannot conclude as a general matter that broadcast experience is always preferable to new voices and diversity in the context at issue here.").

<sup>74</sup> See *id.* ¶¶ 65–66.

<sup>75</sup> See *id.* ("We have historically afforded full power broadcast licensees, commercial and noncommercial, maximum flexibility in selecting programming that the licensees, in their discretion, believe will address local needs.").

<sup>76</sup> *Id.* ¶ 67; see also Nancy L. Reynolds, *Moving Toward Neutrality: The National Telecommunications and Information Administration's New Stance on Sectarian Programming*, 50 FED. COMM. L.J. 711 (1998) (analyzing the overall policy implications to public broadcasting stations, telecommunications law, and the Establishment Clause in general, and the effects on PTFP funding).

the PTFP from claiming a point based on their funding source.<sup>77</sup>

### 5. Finder's Preference

The FCC declined to adopt a point for finder's preference since commenters were most concerned with "copycat" applications.<sup>78</sup> The FCC relieved this concern by switching from cut-off lists to filing windows for the submission of new and major modification NCE FM applications.<sup>79</sup> This procedural change alleviated commenter concerns and the FCC determined that "further consideration of a finder's preference [was] unnecessary."<sup>80</sup>

## IV. HOW TO EVALUATE MUTUALLY EXCLUSIVE NONCOMMERCIAL APPLICATIONS

The FCC has adopted a three-part process for evaluating MX'd noncommercial applications. The initial step is a § 307(b) determination for MX'd applications proposing to serve different communities.<sup>81</sup> If there is a significant disparity in the proposed communities' need for a new or modified station, the application proposing to serve the community with the greatest need is granted.<sup>82</sup> In the second step, the point system is applied if there is no clear difference in need or the applicants propose to serve the same community of license.<sup>83</sup> If one entity has more points than the other, the point leader is tentatively selected and a thirty-day window opens to file petitions to deny. The final step is the

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<sup>77</sup> See NCE R&O, *supra* note 9, ¶ 67. The National Religious Broadcasters argued the PTFP is unavailable to religious broadcasters, so this credit would only be available to non-religious noncommercial broadcasters, a distinction the FCC determined lacked the necessary public interest factors. *See id.*

<sup>78</sup> *See id.* ¶ 68 (occurring when a subsequently filed applicant copies an application filed pursuant to an earlier cut-off date, and merely changes the names of the first applicant. For all intents and purposes, the two applications will be identical and MX'd with one another).

<sup>79</sup> *See id.*; *see also* 2001 NCE Memorandum Opinion and Order, *supra* note 24, ¶ 5 (comparing the proposals ensures the best service to the public interest).

<sup>80</sup> NCE R&O, *supra* note 9, ¶ 68.

<sup>81</sup> *Id.* ¶ 21 (developing the threshold issue of fair distribution of service with analysis from traditional commercial proceedings to reflect "the number of other reserved channel educational FM services available in the proposed service area of each applicant and the areas and populations served thereby" (citing *In re Applications of New York University New York, New York*, Requests: 89.1 mc, #206; 8.3 kw(H); 7.7 kw(V); 220 ft.; Fairleigh Dickinson University Teaneck, New Jersey, Requests: 89.1 mc, #206; 550 w(H); 550 w(V); 500 ft., For Construction Permits, *Memorandum Opinion and Order*, 10 Rad. Reg. 2d (P & F) 215 (1967))).

<sup>82</sup> *See id.* ¶¶ 24–25. Fair distribution of service remains the threshold issue, and proposals will compare the overall service with the population size. *Id.*

<sup>83</sup> *Id.* ¶ 28.

implementation of a tiebreaker if there is no point leader.<sup>84</sup> If the tie cannot be resolved, the FCC will order timesharing between the applicants for the term of the license.<sup>85</sup>

#### A. Step One: Fair Distribution of Service as a Threshold Issue for 47 U.S.C. § 307(b) Determination

The initial analysis in evaluating MX'd NCE applications with differing proposed communities of license requires an examination of the relative need of each community for a noncommercial station.<sup>86</sup> The FCC's decision to consider fair distribution before points is consistent with the procedures for its existing § 307(b) analysis and can be found in the AM commercial radio station auction procedures.<sup>87</sup> Section 307(b) analysis will not be performed at the application stage for those applications proposing to provide services using the same reserve community of license, because such an analysis was performed at the time the reserve channel and community were added to the radio Table of Allotments.<sup>88</sup>

Using the AM commercial radio station auction procedures as a guide, if the Commission determines that a conflict exists between the needs of two communities, the application proposing to provide service to the community with the greatest need should be granted.<sup>89</sup> In order to identify significant need, an applicant must provide a first or second NCE service to at least 2000 people and at least 10% of the population within the 60 dBu (1 mV/m) service contour of the proposed coverage area.<sup>90</sup> New service to 2000 or more people will be

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<sup>84</sup> *Id.* ¶¶ 72–73.

<sup>85</sup> *Id.* ¶ 74.

<sup>86</sup> See 47 U.S.C. § 307(b) (2004) (requiring the FCC to make provide a “fair, efficient, and equitable distribution of radio service” when considering license applications); NCE R&O, *supra* note 9, ¶¶ 3, 24–25; In re Applications of Seattle Public Schools For Renewal of License For Station KNHC(FM), Seattle, Washington and Jack Straw Memorial Foundation, Seattle, Washington For Construction Permit for a New FM Station, *Decision*, 4 F.C.C.R. 625 (Jan. 19, 1989) (explaining the duties of the FCC in a § 307(b) analysis). This threshold analysis is not performed for applications proposing to serve the same reserve community of license because each applicant will have the same level of need. NCE R&O, *supra* note 9, ¶¶ 3, 24.

<sup>87</sup> See Competitive Bidding, *supra* note 19; see also *FCC v. Allentown Broad. Corp.*, 349 U.S. 358 (1955) (holding that the FCC may favor applicants on the basis of community need); *Pasadena Broad. Co. v. FCC*, 555 F.2d 1046 (D.C. Cir. 1977) (analyzing § 307(b) factors to determine that all applicants for broadcasting on a California frequency were in violation of FCC rules and presumptively no applications were efficient or in the public interest).

<sup>88</sup> See NCE R&O, *supra* note 9, ¶ 24.

<sup>89</sup> See *id.* ¶ 24 (pointing to the basis of need as a difference in population size); Competitive Bidding, *supra* note 19.

<sup>90</sup> NCE R&O, *supra* note 9, ¶ 25.



considered superior to second service supplied to any size population.<sup>91</sup> If more than one applicant proposes to provide a first or second NCE service, the applicant providing the most people with the highest level of service will be granted, as long as that applicant provides service to 5000 or more people than the next best applicant.<sup>92</sup>

#### B. Step Two: The Application of the NCE Point System

For MX'd application groups where a tentative selectee or preferred community cannot be determined using the § 307(b) analysis, the FCC will apply the NCE point system. The applicant with the greatest number of points, weighing all point system criteria equally, will be identified as the tentative selectee and the thirty-day period for filing petitions to deny commences.<sup>93</sup> At the end of thirty days, if the FCC receives no petitions or informal objections, the application of the tentative selectee may be granted.<sup>94</sup> Once granted, a construction permit will be issued and the facilities proposed in the application must be constructed within eighteen months.<sup>95</sup>

The FCC must resolve all petitions to deny and complaints filed with the agency before awarding a permit to the tentative selectee.<sup>96</sup> If the FCC changes the point tally of the tentative selectee based on information provided to the Commission in a petition to deny or an informal complaint, the FCC will compare the revised point tally with that of the MX'd applicants and either grant the original application or announce a new tentative selectee.<sup>97</sup> If the tentative selectee is determined to be unqualified as a potential FCC licensee, the applicant with the next highest point tally will be identified as the new tentative selectee and the FCC will open a new thirty-day window for filing petitions to deny.<sup>98</sup>

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* ¶¶ 25–27. Applications that are selected for grant as a result of Section 307(b) analysis are subject to constructing their facilities consistent with the parameters proposed in their application but are not required to comply with the four-year holding period. *See also* Competitive Bidding, *supra* note 19, at app. A.

<sup>93</sup> NCE R&O, *supra* note 9, ¶¶ 26–27.

<sup>94</sup> 47 C.F.R. § 73.3598 (2004).

<sup>95</sup> *Id.*

<sup>96</sup> 47 C.F.R. § 73.7004 (accepting petitions to deny only against the tentative selectee(s), which must contain “allegations of fact supported by affidavit of a person or persons with personal knowledge thereof”).

<sup>97</sup> *Id.* There must be no substantial or material question of fact as to the applicant's qualifications, but the FCC may determine the points were higher than permitted to compare the applicants.

<sup>98</sup> *Id.*

### C. Step Three: Tiebreaking Procedures

If the NCE Point System does not determine a tentative selectee, the FCC will apply its tiebreaker procedures, considering each applicant's total number of existing and pending authorizations.<sup>99</sup> Permits will be awarded to the applicant with the fewest existing station authorizations. This scheme addresses concerns that smaller broadcast interests will not be marginalized by larger national chains. Further, it ensures there are fewer pending applications for the same frequencies.<sup>100</sup> As a last resort, the FCC will order mandatory timesharing for the applicants if it is unable to determine a tentative selectee.<sup>101</sup> Applicants may also be encouraged to reach a settlement before the FCC orders timesharing, a solution that most applicants will try to avoid at all costs.<sup>102</sup>

#### 1. Fewest Existing Authorizations

For tiebreaker purposes, the tentative selectee will be the applicant who, at the time of filing, has the fewest number of existing stations.<sup>103</sup> For closed MX'd application groups, the FCC designates a "supplemental date" as the time of filing.<sup>104</sup> Applicants are also required to amend their applications, pursuant to 47 C.F.R. § 1.65, in order to update their number of existing authorizations.<sup>105</sup> Since multiple MX'd applications have been pending for five to ten years, some applicants have purchased or constructed new stations, affecting the number of existing stations for an entity.<sup>106</sup> Selecting an application filed by an entity with the fewest number of existing and attributable stations furthers the FCC's goals of encouraging ownership diversity.<sup>107</sup>

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<sup>99</sup> NCE R&O, *supra* note 9, ¶ 72 (following the structure implemented in the ITFS Service).

<sup>100</sup> *See id.* ¶¶ 72–73.

<sup>101</sup> *Id.* ¶ 74 (applying the general rules for broadcasting settlements as outlined in 47 C.F.R. § 73.3525).

<sup>102</sup> *See, e.g.,* Jon Murray, *Broadcaster Loses His FCC Petition*, INDIANAPOLIS STAR, Mar. 9, 2005, at B2.

<sup>103</sup> *See* NCE R&O, *supra* note 9, ¶ 72. For radio applicants, attributable radio stations will be included and for television applicants, attributable television stations will be included. *See also* *In re* Amendment of Part 74 of the Commission's Rules and Regulations in Regard to the Instructional Television Fixed Service, *Third Report and Order*, 4 F.C.C.R. 4830 (June 13, 1989).

<sup>104</sup> 2001 NCE Memorandum Opinion and Order, *supra* note 24, ¶ 6.

<sup>105</sup> *Id.* ¶ 24 (requiring notification of material changes to the application, "includ[ing] all changes that negatively affect its claimed points and tie breaker position").

<sup>106</sup> Any stations owned directly by an applicant or attributable to the applicant are included. *See* NCE R&O, *supra* note 9, ¶¶ 74–75.

<sup>107</sup> *Id.* ¶ 72 ("We do not believe that national ownership factors are especially important in making an initial determination of the applicant's quality in the initial stages of a point system, but we do believe, among equally qualified applicants, that the public should have

## 2. Fewest Pending New and Major Change Applications

If the number of existing stations for each applicant does not determine a tentative selectee, the FCC will next compare the amount of pending new and major change applications in the same service at the time of filing for each applicant.<sup>108</sup> Contending entities are responsible for amending their applications to keep current the number of pending applications they have filed with the FCC.<sup>109</sup> This tiebreaker criteria encourages parties to submit a limited number of applications in order to conserve spectrum and to reduce the number of copycat applications. The FCC decided to select pending applications as a secondary tiebreaker because “an applicant with many pending applications merely has a greater possibility of obtaining more stations, whereas an applicant with more permits and licenses has already achieved that goal.”<sup>110</sup>

## 3. Timesharing

If a tie remains after the FCC has compared the number of existing stations and pending applications for MX'd applicants, the Commission will divide the time equally among all applicants.<sup>111</sup> Since timesharing is confusing to listeners and not favored by applicants, the FCC will accept a settlement from the parties at any time during the NCE point system process.<sup>112</sup> The general rule for broadcast settlements, requiring that “the settling parties certify that they have not received consideration in excess of their legitimate and prudent expenses,” will apply.<sup>113</sup>

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the opportunity to receive service from the applicant who has the fewest existing outlets to express a particular viewpoint.”).

<sup>108</sup> *Id.* ¶ 73.

<sup>109</sup> *See id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* ¶¶ 73–74.

<sup>112</sup> *See id.*

<sup>113</sup> *Id.*; *see also* 47 C.F.R. § 73.3525 (2004); Deadline for Settlements and Supplements Extended to July 19, 2001, Date for Calculating Comparative Calculations Remains June 4, 2001, *Public Notice*, 16 F.C.C.R. 10,892 (May 24, 2001); Window Opened to Permit Settlements for Closed Groups of Mutually Exclusive Broadcast Applications, *Public Notice*, 16 F.C.C.R. 17,091 (Sept. 27, 2001); Extended Settlement Period for Closed Groups of Mutually Exclusive Broadcast Applications Announced, *Public Notice*, 16 F.C.C.R. 22,047 (Dec. 14, 2001).

## V. DIFFICULTIES THE FCC WILL FACE AS IT IMPLEMENTS THE NCE POINT SYSTEM

### A. Attribution

As with commercial applicants, the governing boards of non-profit organizations change on a regular basis as members resign or their terms end.<sup>114</sup> Consequently, NCE applicants must be cautious in selecting their board membership. Applicants must pay particular attention to the identification of other broadcast interests a member may have or an existing member may acquire.<sup>115</sup> Since a number of NCE Point System criteria—including local diversity, localism, and the tiebreakers—are based on an applicant's other broadcast interests, it is important for an entity to file § 1.65 amendments to their applications if board changes adversely affect its point totals.<sup>116</sup> Contenders for NCE stations cannot amend their applications to improve their point position vis-à-vis other applicants in their MX'd group.<sup>117</sup> The FCC recommends that entities include language in their governing documents restricting other broadcast interests of board members and requiring that at least 75% of board members reside within twenty-five miles of an applicant's proposed community of license.<sup>118</sup> Such measures will ensure that an applicant's board maintains compliance with the FCC's requirements necessary to receive points for localism. If the governing documents of an entity awarded a construction permit do not contain restrictions for board members, the FCC will monitor the applicant to ensure continued compliance with the agency's localism criteria. It is unclear whether an entity with restrictions on its board membership will be favored by being awarded points over another applicant whose governing documents do not contain the same restrictions.

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<sup>114</sup> See generally *In re Application of The Craw-Kan Telephone Cooperative Association, Inc.*, 46 Rad. Reg. 2d (P & F) 124 (Aug. 27, 1979) (exemplifying the issues that arise when licensee membership control transfers).

<sup>115</sup> See NCE R&O, *supra* note 9, ¶ 75. Commercial broadcast methods for determining control are not always applicable to frequently changing noncommercial applicant boards. *Id.* Yet, this commercial framework is considered when basing noncommercial attribution standards and policies, with some structural adjustments and differences. *Id.*

<sup>116</sup> See Section 1.65 Amendment Deadline Established for Noncommercial Educational FM and FM Translator Station Applications, *Public Notice*, 19 F.C.C.R. 24,740 (Dec. 22, 2004).

<sup>117</sup> See *id.* (noting applicants may not report any positive changes after the established "snap-shot" dates for fair distribution determinations, and point system or tiebreaker criteria pursuant to statute).

<sup>118</sup> See NCE R&O, *supra* note 9, ¶ 54.

## B. Use of Commercial Non-Reserved Channels by NCE Applicants

NCE applicants seeking commercial frequencies for NCE use will not be evaluated by the point system. Commercial channels are awarded through the auction process regardless of whether the applicant intends to use the channel for a commercial or a noncommercial purpose.<sup>119</sup> This poses difficulties for NCE FM stations attempting to serve a radio-congested community that has no reserved channels available. In these locations, a NCE station's only option is to apply for commercial spectrum. Since spectrum is a valuable and scarce resource, the cost of most commercial spectrum construction permits auctioned by the FCC is financially unattainable by nearly all NCE applicants. Alternatively, NCE applicants will need to consider purchasing an existing station in the market, and re-license it as an NCE FM station. This will give an NCE applicant access to a congested community even though the entity may have to settle for a less desirable station.

## C. NCE Spectrum Rulemaking Petitions

NCE applicants in the future may file a petition for rulemaking to amend the radio Table of Allotments to change a commercial channel to a reserve channel. Such a change may be allowed if the petitioner is able to demonstrate that no NCE radio channel is currently assigned to serve the community; *and* that an NCE service would provide a first or second NCE service to more than 2000 people and 10% of the population within the 1 mV/m contour of the proposed radio station or the Grade B contour of the proposed television station.<sup>120</sup>

Even if this high standard is achieved, it does not guarantee that the petitioner will be awarded the construction permit to build a station on the newly reserved channel. If a petitioner is successful in having a channel reallocated for noncommercial use, that channel may be applied for in an open application window.<sup>121</sup> If other applications are received for the newly reserved channel, the NCE Point System will be applied to the MX'd applications in order to identify a tentative selectee.<sup>122</sup> The FCC is in the process of evaluating its criteria for amending the radio Table of Allotments. Applicants may be faced with a slightly different set of requirements to have a channel reallocated for non-

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<sup>119</sup> *Id.* ¶ 2 (commenting that utilizing auctions on commercially available channels, even if NCE applicants are competing, reconciles the statute's conflicting directives).

<sup>120</sup> *See id.* ¶ 114. The FCC assumes that there will most likely be a first or second commercial service received in the area of the request. However, NCE applications seeking to reserve an unreserved channel in an area that is not already served by two commercial channels, are to be considered by the Media Bureau on a case-by-case basis. *Id.* 7434 n.84.

<sup>121</sup> *See id.* ¶ 114.

<sup>122</sup> *See id.*

commercial use in the future.

#### D. Potential for Abuse

Speculation is an important factor for the FCC and bona fide applicants seeking to construct a new NCE station to serve their community. Unfortunately, speculation creates a real problem because certain applicants only file applications for new stations in the hopes their application will not be MX'd and they will be able to quickly sell their permit. Other stations believe their application will be MX'd and a settlement will be reached for money above costs with the other applicants in the MX'd application group. The ultimate goal for these applicants is to make money, not to serve the public interest, convenience and necessity.<sup>123</sup>

To minimize speculation, the FCC adopted a four-year holding period and required applicants awarded a construction permit to construct their proposed facilities substantially as identified in their application.<sup>124</sup> This holding period will also give the winning applicant time to develop its educational programming and begin to provide service to its local community.

Speculation creates a problem for several reasons: NCE stations are not subject to the FCC's multiple ownership rules, the FCC has instituted a policy of granting main studio waivers, and there is a "lack of filing fees and regulatory fees for NCE stations."<sup>125</sup> The holding period and filing windows discourage the filing of copycat applications. The elimination of such applications will significantly reduce the overall number of applications filed with the FCC for new NCE stations.

#### E. Holding Period

The FCC adopted a license holding period to mitigate speculation and to ensure that the applicant awarded a station would construct that station initially as proposed. The FCC decided that a four-year waiting period—rather than a one year period for commercial stations awarded through an auction—is the appropriate holding period since this is one-half of a station's license term.<sup>126</sup>

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<sup>123</sup> The FCC has opened settlement windows and recommends MX'd applicants reach an agreement to resolve the situation. During these designated settlement windows, the FCC generally waives its rule limiting settlement compensation to an applicant's actual expenses. See sources cited *supra* note 113.

<sup>124</sup> NCE R&O, *supra* note 9, ¶ 93 (attempting to provide a meaningful service to the community without putting undue burden on the licensees).

<sup>125</sup> *Id.* ¶ 82.

<sup>126</sup> *Id.* ¶ 93 (noting four years is half of the eight year license term and in four years an applicant would be established and able to fully implement its educational program, receive

The holding period is only applicable to MX'd NCE FM applications granted under the NCE Point System. Applicants selected under § 307(b), via settlement, and non-MX'd stations are not subject to the holding period because their applications are granted without applying the NCE Point System. Construction permits awarded subsequent to the application of the NCE Point System must comply with 47 C.F.R. §§ 73.7002(c) and 73.7005(b).<sup>127</sup>

Recognizing that stations sometimes lose their antenna site, and that board members change, the FCC has adopted some exceptions to its holding period.<sup>128</sup> Stations are required to be constructed substantially as proposed, or if a site is lost through no fault of the applicant, a new site is selected that will provide "an equivalent coverage of area and population."<sup>129</sup> During the holding period, *pro forma* assignments of license and transfers of control will be permitted by the FCC. If a non-*pro forma* assignment of license or transfer of control is proposed and consented to by the FCC during the four year holding period, the FCC's consent will contain a condition that the consideration for the assignment of license or transfer of control is limited to the licensee's "reasonable and prudent expenses."<sup>130</sup> The FCC's definition of reasonable and prudent expenses is limited to expenses for "the costs of obtaining the permit and constructing the station, but will not include costs of station operations."<sup>131</sup>

#### F. The Commission, Not the FCC Staff, Must Make NCE Point System Determinations

The NCE Point System is a type of simplified hearing. By statute, the FCC staff may conduct hearings, but the Commission lacks the authority to delegate hearings to Commission staff.<sup>132</sup> Only administrative law judges, individual

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feedback from the community and program underwriters, and adjust its programming accordingly).

<sup>127</sup> 47 C.F.R. § 73.7002(c) (2004) ("For a period of four years of on-air operations, an applicant receiving a decisive preference pursuant to this section is required to construct and operate technical facilities substantially as proposed and shall not downgrade service to the area on which the preference was based."); *id.* § 73.7005(b) ("In accordance with the provisions of Sec. 73.7002, an NCE applicant receiving a decisive preference for fair distribution of service is required to construct and operate technical facilities substantially as proposed, and can not downgrade service to the area on which the preference is based for a period of four years of on-air operations.").

<sup>128</sup> NCE R&O, *supra* note 9, ¶ 94.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* ¶¶ 96–97.

<sup>131</sup> *Id.* ¶ 97. The inability to recover operating costs is a clear indication of the FCC's preference for applicants to retain control of their constructed facilities for the entire holding period. Since it is expensive to operate a station, most stations will be unable to sell their station without being able to recover their costs. *Id.*

<sup>132</sup> See 47 U.S.C. § 155(c)(1) (2000) (delegating functions are permitted, but only to an "employee board consisting of two or more employees"); NCE R&O, *supra* note 9, ¶ 80.

commissioners, or the full Commission may conduct hearings.<sup>133</sup> The FCC maintains a preference for delegating NCE Point System determinations to the FCC staff but has been unable to do so without the requisite legislative authority.<sup>134</sup> In the interim, NCE Point System determinations will be referred to the full Commission for disposition.<sup>135</sup>

## VI. SUGGESTED REGULATORY AND LEGISLATIVE ACTION TO AID THE IMPLEMENTATION OF THE NCE POINT SYSTEM

While the NCE Point System is very complex and its implementation will continue to challenge regulators, there are a few courses of action that the Commission should take to ease the process.

### A. Seek Delegated Authority from Congress

The Commission includes four commissioners and one chairman—three commissioners from the majority party, and two commissioners from the minority party.<sup>136</sup> As with any bureaucracy, it will likely take a long time for the Commission to reach agreement on the selection of a tentative selectee for each MX'd application group. Applicants have been waiting many years to learn whether the Commission has selected their application. Leaving NCE Point System determinations to the full Commission will be time consuming, an inefficient use of the Commission's resources, and will further delay the selection of a tentative selectee. To facilitate the system, the FCC must seek delegated authority from Congress.<sup>137</sup> Pursuant to delegated authority, the FCC staff would be able to review MX'd application groups for a § 307(b) determination and apply the NCE Point System, if necessary, at the same time. This would be a more efficient use of the FCC's resources and would eliminate the need for staff to present each MX'd application group to the full Commission

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<sup>133</sup> 47 U.S.C. § 155(c)(1).

<sup>134</sup> The FCC was able to obtain similar legislative authority for the ITFS point system and expects Congress will be willing to do the same for the NCE point system. *See* NCE R&O, *supra* note 9, ¶ 80.

<sup>135</sup> *See id.*

<sup>136</sup> *See* FCC, ABOUT THE FCC: A CONSUMER GUIDE TO OUR ORGANIZATION, FUNCTIONS AND PROCEDURES 2, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-247863A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-247863A1.pdf) (last visited Oct. 29, 2005). The commissioners are appointed by the President and generally confirmed for five-year terms. Only three may be members of the same political party, and none may have a financial interest in any Commission-related business. *Id.*

<sup>137</sup> *See* Public Broadcasting Act of 1967, Pub. L. No 90-129, 81 Stat. 368; H.R. REP. NO. 90-572 (1967). Delegated authority was included in the Corporation for Public Broadcasting draft of its proposed reauthorization in 1999 but was not adopted in the proposal adopted by Congress.



to obtain the tentative selectee.

While awaiting delegated authority, the FCC should assign the NCE Point System determination to an administrative law judge or designate an individual commissioner primarily responsible for point system determinations. A single administrative law judge or commissioner will be able to more quickly and effectively determine a tentative selectee from each MX'd application group than the full Commission. It is in the best interests of the FCC to find the most effective solution to this problem so that Commission resources will be available for other projects and listeners will obtain the benefits of having new NCE stations in their community. Furthermore, more than five years have passed since the FCC has opened a window for filing new NCE station applications or major modifications of existing stations. Since listeners are unable to benefit from new stations or improved facilities of existing stations, the public interest has suffered.

## B. Clarify What Qualifies as Minimal Compliance

### *1. How to Define What Qualifies for Each Point Factor*

Since no NCE point determinations have been made, it is unclear whether an applicant may receive full or partial points for the system's various criteria. The FCC has identified the criteria and stated why each is important, but the FCC has been less clear about what it will actually accept as minimum compliance. This will remain an open issue until the FCC begins to identify a tentative selectee using the NCE Point System. Unfortunately, any lessons learned from this process will not benefit applicants with pending MX'd applications because amending applications to improve point tallies is impermissible. In the next open window for filing new station applications and major modifications to existing stations, applicants will benefit from any lessons learned regarding what the FCC determined to be sufficient conduct for an applicant to claim credit for a NCE Point System criteria in the previous application processing round.

### *2. Defining an Established Local Entity*

The FCC has clarified the definition of an "established local entity," but this has not resolved the definition for applicants.<sup>138</sup> Settling on a definition is important because this criteria carries three points in the NCE point system, the maximum of any factor. The current definition includes entities who maintain

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<sup>138</sup> See NCE R&O, *supra* note 9, ¶ 54.

physical headquarters or a campus or have 75% of board members<sup>139</sup> residing within twenty-five miles of the reference coordinates of the center of the proposed community of license.<sup>140</sup> Maintaining these characteristics may be accomplished in a various ways, including "a holding period . . . ; a local main studio in radio; or by-laws requiring a 75% local board for non-governmental NCE organizations."<sup>141</sup> Governments are considered by the FCC to be local throughout the area within which their authority extends.

A split exists in the noncommercial community in how to define a local entity. Some organizations favor defining a local entity by analyzing its board members, while others favor looking at the entity as a whole and its contribution to the community. As noted above, the FCC has shifted back to a definition based on the entity as a whole or as identified by its members. The second part of this definition is problematic. Allowing a local entity to be defined in terms of its board members appears similar to integration. As previously stated, the FCC's concept of integration from its comparative hearing criteria was deemed arbitrary and capricious in *Bechtel*.<sup>142</sup> Returning to such a definition for a local entity would jeopardize the NCE Point System by establishing legal uncertainty in the system.<sup>143</sup>

The FCC should expect petitions to deny and informal objections challenging an applicant's standing as an established local entity. Petitioners will argue that a nonprofit organization is not established within a community, and as the FCC has stated, mere existence is not sufficient to "establish" an organization as an existing legal entity.<sup>144</sup> An established legal entity must have a role in the

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<sup>139</sup> See *id.* Basic NCE television application standards require greater than 50% of a local board members be in non-government entities. In addition, "these local board members must be broadly representative" of a broad cross-section of the local community, such as businesses, civic groups, professions, religious groups, and private schools. See *In re Ascertainment of Community Problems by Broadcast Applicants, First Report and Order*, 57 F.C.C.2d 418 (Jan. 7, 1976).

<sup>140</sup> See 47 C.F.R. § 73.208(a)(1)(ii)-(iv) (2004) (reference points for a community of license include checking the FCC engineering database for "reference coordinates designated by the FCC; . . . coordinates listed in the United States Department of Interior publication entitled Index to the National Atlas of the United States of America; or [] coordinates of the main post office"); see also *In re Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations, Report and Order*, 13 F.C.C.R. 15,691 (Apr. 11, 1998) (explaining main studio location requirements for commercial stations).

<sup>141</sup> NCE R&O, *supra* note 9, ¶ 54.

<sup>142</sup> See *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993).

<sup>143</sup> See *id.* at 880-81. Integration proposes the participation by station owners in the day-to-day operation of the station, and the Court felt this system lacked accountability. The same is true for 75% of board members being from the local community because no known mechanism exists to ensure applicants are maintaining such a level of local membership once their application has been granted.

<sup>144</sup> See NCE R&O, *supra* note 9, ¶ 55 ("This requirement would serve to limit the feign-

community before it can claim itself as such. Petitioners will be obligated to convince the FCC that a tentative selectee does not have the requisite ties to the local community to be an established local applicant.

### C. Establishing a Series of Checks and Balances to Protect the Public Interest

#### *1. Can Any Set of Standards Remain Simple Once They Are Contested?*

One of the FCC's objectives for the NCE Point System was to select a new methodology to replace comparative hearings that would be easier and more efficient to apply. A point system on its face certainly meets both of those criteria. Nevertheless, this will change once the parties begin to challenge the system in the form of petitions to deny, informal objections, and petitions for reconsideration. As with any set of rules adopted by the FCC, various challenges from petitioners will force the Commission to fine-tune its definitions within the point system criteria. As a result, exceptions and various interpretations to the system will inevitably develop. The FCC must resist the temptation to stray from the definitions and interpretations it has created throughout the development of the system in order to maintain its simplicity. However, this is an unrealistic goal. There will always be instances when the public interest will support a slightly different or less strict interpretation of the system. The FCC must be diligent in its review of the individual facts and circumstances of each MX'd application group to identify those few that are truly the exceptions and in need of special attention.

#### *2. How to Handle Hearings When Applicants Challenge Decisions—Full Evidentiary Hearing?*

The NCE Point System is a type of simplified hearing. Uncertainty results where a petition to deny raises misrepresentation or character issues. The usual procedure would be for the application to be designated for hearing. Since the NCE Point System is a type of hearing, would the FCC designate an MX'd application for a full evidentiary hearing? Furthermore, if an administrative law judge applied the system to identify the tentative selectee, it is unknown at this time who will preside over a full evidentiary hearing. The FCC's proposal is to select the application with the next highest point total as the new tentative selectee if disqualifying issues arise in a petition to deny. Unfortunately, the FCC has not identified exactly what those procedures will be in order to review

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ing of local qualifications, and also to establish the applicant's educational credentials in this particular area.").

issues raised in a petition to deny that may disqualify a tentative selectee. Since the Commission or an administrative law judge must apply the NCE Point System, the same decision-maker should preside over the evidentiary hearing. The original decision-maker will be familiar with the facts of the MX'd applications and be able to move the hearing along more efficiently.

### *3. Section 307(b) Determinations Are Based on the Assumption That the Facts Presented by the Applicants Are Accurate*

Section 307(b) criteria is applied by the Media Bureau to MX'd applications to determine if there is an application that can be granted based on need.<sup>145</sup> This determination uses the population and coverage area supplied by the applicants. Without independent verification by the FCC or questioning of such data by other parties, it will be possible for an application to be granted despite containing faulty or inaccurate population numbers and coverage area. If a competitor can successfully challenge the information relied on, and no other community can demonstrate significant need for a new station, then the MX'd application group will need to proceed to the Commission or an administrative law judge in order to apply the NCE Point System criteria. Alternatively, if an application is granted based on inaccurate or exaggerated population numbers or coverage area, a construction permit will contain inaccurate data and it will be nearly impossible for the station to be built substantially as proposed in its initial application. Since construction will not be able to be completed substantially as proposed, the new station will not be constructed and the channel will again be available to applicants—after large amounts of applicant and FCC resources have been wasted.<sup>146</sup>

### *4. Establishing Qualifications as a "Community of License"*

In recent years, the FCC has tightened its rules regarding community of license coverage for NCE FM Stations. Currently, the FCC rules require a station to provide coverage to 50% of its community of license. These regulations do not define what qualifies as a community of license, so in many cases stations are proposed for very small towns near large cities. In a small town, 50% coverage of an applicant's community of license would encompass a very

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<sup>145</sup> See 47 U.S.C. § 307(b) (2000); NCE R&O, *supra* note 9, ¶¶ 22–25.

<sup>146</sup> See NCE R&O, *supra* note 9, ¶¶ 22–25. A similar situation exists for NCE Point System determinations. If an applicant's underlying documentation supporting its point claims is not reviewed, then a construction permit may be awarded to an applicant that provided inaccurate or faulty information. If the proposed regulation and coverage area are exaggerated, then the station will not be able to be constructed substantially as proposed and the channel will ultimately be returned to the FCC.

small area, meaning that a station could be constructed closer to the large city. As with real estate, constructing a station is all about location. The more people a station is able to reach, the more underwriting it will be able to attract thereby reducing the costs of operating the station. A station constructed closer to a big city will also be able to provide educational programming for the schools in the larger city, perhaps, at the expense of the smaller one, the station's community of license. The FCC's NCE Point System rules specify that a station must provide the service proposed in its application but there is no requirement that the station's best efforts must be concentrated on its proposed service rather than service it was able to develop because of a favorable location. The Commission's community of license rules also allow for a substantial amount of flexibility in determining what qualifies to be a community of license.

## VII. CONCLUSION

When the FCC finally decided it was time to replace comparative hearings, it had the difficult task of adopting a new methodology that would be less subjective and more efficient in selecting an applicant to grant. The FCC adopted a point system for comparing MX'd NCE applications. Many applicants and other interested parties are still waiting to see who will be applying the point system because the FCC has no authority to delegate NCE Point System determinations to the FCC's Media Bureau. Once the Commission, an administrative law judge, or FCC staff members begin to apply the system, problems will surely arise and the FCC will then need to decide how many exceptions and interpretations it is willing to create. In the meantime, the FCC may improve the process, but many regulatory and legislative actions must be taken to fully facilitate the implementation of NCE Point System.

